No. 82-1219

In the Supreme Court of the United States

OCTOBER TERM, 1982

HERBERT CLYDE SQUIRES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld the determinations of the immigration judge and the Board of Immigration Appeals that petitioner is a deportable alien pursuant to 8 U.S.C. 1251(a)(1) because, at the time of his entry into the United States, petitioner was excludable under 8 U.S.C. 1182(a)(9) on the basis of his prior conviction for a crime involving moral turpitude.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 689 F.2d 1276. The decisions of the Board of Immigration Appeals (Pet. App. 22-26) and the immigration judge (Pet. App. 27-32) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1982. A petition for rehearing was denied on December 21, 1982 (Pet. App. 20-21). The petition for a writ of certiorari was filed on January 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. 8 U.S.C. 1251(a)(1) provides:

> (a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who —

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry[.]

2. 8 U.S.C. 1182(a)(9) provides in pertinent part:

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(9) Aliens who have been convicted of a crime involving moral turpitude * * *. Any alien who would be excludable because of the conviction of a misdemeanor classifiable as a petty offense under the provisions of section 1(3) of title 18, [United States Code,] by reason of the punishment actually imposed * * * may be granted a visa and admitted to the United States if otherwise admissible: *Provided*, That the alien has committed only one such offense * * *[.]

STATEMENT

Petitioner, a native and citizen of Canada, entered the United States on June 14, 1979, as a nonimmigrant visitor for pleasure with authorization to remain until June 17, 1979. On July 10, 1979, the Immigration and Naturalization Service served upon petitioner an order to show cause and notice of hearing charging that petitioner was subject to deportation under Section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1), on the ground that he was excludable under the provisions of Section 212(a)(9) of the Act, 8 U.S.C. 1182(a)(9), based on his conviction, prior to entry into the United States, of a crime involving moral turpitude (Pet. App. 23).

1. The undisputed evidence at petitioner's deportation hearing showed that, on August 11, 1970, petitioner was

convicted in the Provincial Court of Canada (Criminal Division) of having unlawfully and by a "false pretence" obtained $450 in Canadian currency from the Victoria and Grey Trust Co., Ltd. with intent to defraud, in violation of Section 304(1)(a) of the Criminal Code of Canada.[1] Petitioner's sentence was suspended in favor of a six-month term of probation (Pet. App. 24, 29).

At the deportation hearing, petitioner asserted, in essence, that he was not deportable as charged because the penalty actually imposed upon him by the Canadian court makes the crime for which he was convicted a "petty offense" when measured by United States standards (Pet. App. 29). The INS, on the other hand, contended that under applicable United States law, petitioner's crime could not be considered a misdemeanor and that it therefore could not be deemed a petty offense (*id.* at 30).

The immigration judge determined that there was no federal offense equivalent to petitioner's crime, but that the District of Columbia false pretenses statute, D.C.Code Ann. § 22-1301 (1973), was the appropriate equivalent

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[1]Section 304 of the Canadian Criminal Code (*reprinted in* J. Martin, A. Mewett & I. Cartwright, *Martin's Annual Criminal Code* 300 (1970)) provided in pertinent part (Pet. App. 4-5 n.5):

> (1) Everyone commits an offense who
>
> (a) by false pretence * * * obtains anything in respect of which the offense of theft may be committed or causes it to be delivered to another person * * *.

The punishment provision of the statute provided (Pet. App. 30):

> Everyone who commits an offense under paragraph (a) of subsection (1) is guilty of an indictable offence and is liable, to imprisonment for ten years * * * where the value of what is obtained exceeds $50.00 * * *.

As the court of appeals noted (Pet. App. 5 n.5), the statute was renumbered without substantive change in 1970.

United States offense.[2] Because both the Canadian offense of which petitioner was convicted and its United States equivalent were punishable by imprisonment for a term exceeding one year, the immigration judge concluded that petitioner's Canadian conviction was for an offense that would constitute a felony under United States law and that the petty offense exception of 8 U.S.C. 1182(a)(9) was accordingly inapplicable (Pet. App. 30-31).

The Board of Immigration Appeals upheld the immigration judge's finding of deportability (Pet. App. 22-26).

2. On petition for review, the court of appeals affirmed the Board's order of deportation (Pet. App. 1-19). The court agreed with petitioner's contention that the District of Columbia bad check statute, D.C. Code Ann. § 22-1410 (1973), is more closely analogous to petitioner's Canadian offense than the false pretenses offense defined by D.C. Code Ann. § 22-1301 (1973) (Pet. App. 3-10). In making this determination, the court first noted (*id.* at 2) that petitioner's offense apparently involved the passing of a check with the knowledge that there were insufficient funds to cover it. The court pointed out that Canada, unlike the District of Columbia, does not have a separate bad check statute and that "all bad check violators in Canada are prosecuted, if at all, under Section 304(1)(a)" (Pet. App. 9). Based on the circumstances of petitioner's offense, the court concluded that, if petitioner had committed that offense in the District of Columbia, "it is more likely that [petitioner] would have

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[2] 22 D.C. Code Ann. § 22-1301 (1973) provides in pertinent part:

> Whoever, by any false pretense, with intent to defraud, obtains from any person any service or anything of value * * * shall, if the value * * * or the sum or value of the money, property, or service so obtained, procured, sold, bartered, or disposed of is $100 or upward, be imprisoned not less than one year nor more than three years * * *.

been prosecuted under Section 1410 [the bad check statute], or would at least have had an opportunity to plead guilty thereunder" (Pet. App. 10).

The court of appeals then determined whether, as a matter of law, the provisions of Section 22-1410 should be applied as they existed at the time of petitioner's foreign conviction or at the time of his entry into the United States. Only in the former situation would petitioner be eligible for the limited exception of 8 U.S.C. 1182(a)(9), because shortly after petitioner's conviction, and almost nine years before his entry, Congress amended Section 22-1410 to provide for punishment as a felony.[3] The court held that

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[3]Petitioner was convicted in Canada on August 11, 1970. As of that date, D.C. Code Ann. § 22-1410 (1967) provided for misdemeanor-level punishment. The statute was amended on October 22, 1970, to provide for felony-level punishment.

In August 1970, D.C. Code Ann. § 22-1410 (1967) provided:

> Any person within the District of Columbia who, with intent to defraud, shall make, draw, utter, or deliver any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, or order in full upon its presentation, shall be guilty of a misdemeanor and punishable by imprisonment for not more than one year, or be fined not more than $1,000, or both.

Pursuant to an amendment enacted on October 22, 1970, D.C. Code Ann. § 22-1410 (1973) now provides:

> Any person within the District of Columbia who, with intent to defraud, shall make, draw, utter, or deliver any check, draft, order, or other instrument for the payment of money upon any bank or other depository, knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, order, or other instrument in full upon its presentation, shall, if the amount of such check, draft, order, or other instrument is $100 or more, be guilty of a felony and fined not more than $3,000 or imprisoned for not less than one year nor more than three years, or both[.] * * *

because an alien's excludability is determined as of the time of his entry into the United States, the proper approach is to examine the provisions of the analogous domestic statute as of the time of entry and not as of the time of conviction.

ARGUMENT

Petitioner contends that the court of appeals erred in affirming the deportation order on a ground not relied upon or presented at the administrative level, and that the rule adopted by the court is incorrect on its merits. It is our submission that petitioner was properly found deportable by both the immigration judge and the Board of Immigration Appeals, and that the decision below affirming the order of deportation does not warrant review by this Court.

1. The contentions raised in the petition rest on the assumption that the court of appeals was correct in rejecting the conclusions of the immigration judge and the BIA that the Canadian offense of which petitioner was convicted was more closely analogous to the District of Columbia bad check statute (D.C. Code Ann. § 22-1410 (1973)) than to the District of Columbia false pretenses statute (D.C. Code Ann. § 22-1301 (1973)). There is no need even to address petitioner's contentions, however, if petitioner's Canadian offense may properly be regarded as a felony under the reasoning adopted by the administrative body.

The Canadian statute under which petitioner was convicted provides for punishment exceeding one year's imprisonment. See note 1, *supra*. As the court of appeals acknowledged, petitioner's offense "would appear to be a felony under the statutory definitions set forth in 18 U.S.C.

§ 1(1) and (2)" (Pet. App. 5).[4] The court below properly noted (*ibid.*), however, that in order to provide consistency in the application of 8 U.S.C. 1182(a)(9), the BIA and the courts look to "the maximum penalty for an analogous statutory offense under the laws of the United States," *i.e.*, Title 18 of the United States Code, or, if no equivalent offense can be found therein, Title 22 of the District of Columbia Code. See *Giammario* v. *Hurney*, 311 F.2d 285, 286-287 (3d Cir. 1962); *Soetarto* v. *INS*, 516 F.2d 778, 780-781 (7th Cir. 1975); *Chiaramonte* v. *INS*, 626 F.2d 1093, 1097-1099 (2d Cir. 1980); *Knoetze* v. *United States Department of State*, 634 F.2d 207, 211 (5th Cir.), cert. denied, 454 U.S. 823 (1981); *In re Grazley*, 14 I. & N. Dec. 330 (1973); *In re Katzanis*, 14 I. & N. Dec. 266 (1973). See generally 1 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 2.43d, at 2-321 to 2-322 & n.76 (1977).

Here, the immigration judge and the BIA correctly concluded that petitioner's Canadian offense was analogous to the District of Columbia false pretenses statute. Indeed, the elements of D.C. Code Ann. § 22-1301 (1973) are virtually identical to those of Section 304(1)(a) of the Canadian Criminal Code. See notes 1 and 2, *supra*. As the court of appeals itself conceded (Pet. App. 7), "[b]oth sections codify the common law crime of false pretenses in their respective jurisdictions, and each requires proof of similar elements." The court nevertheless concluded (*id.* at 8-10) that, in the particular circumstances of this case, the District of

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[4] 18 U.S.C. 1 provides in pertinent part:

> Notwithstanding any Act of Congress to the contrary:
>
> (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
>
> (2) Any other offense is a misdemeanor.
>
> • • • • •

Columbia bad check statute (D.C. Code Ann. § 22-1410 (1973)) — a lesser included offense of Section 22-1301 — was the more closely analogous domestic offense. The court reached this conclusion by entertaining the possibility that, if petitioner had committed the crime in the District of Columbia, he might have been charged with, or at least been given the opportunity of pleading guilty to, the lesser offense.

We submit that the court below erred in its analysis. It is not the province of the BIA or the courts to indulge in speculation or conjecture about whether a prosecuting officer in this country might have chosen, as a matter of discretion, to bring lesser charges against an alien who is otherwise excludable under 8 U.S.C. 1182(a)(9). Both administrative and judicial review in this context should be limited to the judicial record of conviction, and should not be based on an independent assessment of the underlying circumstances. See *Zinnanti* v. *INS*, 651 F.2d 420, 421 (5th Cir. 1981); *Chiaramonte* v. *INS, supra*, 626 F.2d at 1098. As the Second Circuit stated in an analogous context (*ibid.*, quoting *Pino* v. *Nicolls*, 215 F.2d 237, 245 (1st Cir. 1954), rev'd on other grounds, 349 U.S. 901 (1955)):

> If the crime in its general nature is one which in common usage would be classified as a crime involving moral turpitude, neither the administrative officials in a deportation proceeding nor the courts on review of administrative action are under the oppressive burden of taking and considering evidence of the circumstances of a particular offense so as to determine whether there were extenuating factors which might relieve the offender of the stigma of moral obliquity.

The approach adopted by the court of appeals, of requiring the immigration authorities to inquire into the circumstances underlying a foreign conviction and speculating about how a prosecutor in this country might have handled a similar situation, "could not, as a practical matter, assure

a forum reasonably adapted to ascertaining the truth of the claims raised. It could only improvidently complicate the administrative process." *Zinnanti* v. *INS, supra,* 651 F.2d at 421. This point is illustrated by this case, since the court of appeals itself acknowledged that "[t]he precise nature of [petitioner's] offense is not entirely clear, for neither the immigration judge nor the attorneys involved in the case questioned him about it at the deportation hearing" (Pet. App. 2 n.1). Accordingly, the court's understanding of the circumstances of petitioner's offense was based entirely on petitioner's description of them in his initial brief (*ibid.*).

In short, the court of appeals properly upheld the deportation order, but for the wrong reasons. Thus, it is not necessary for the court to consider the contentions raised in the petition.

2. Contrary to petitioner's contention (Pet. 8-11), the court of appeals reasonably applied a "relation-back" theory in construing D.C. Code Ann. § 22-1410 (1973) for purposes of determining petitioner's deportability under 8 U.S.C. 1251(a)(1) and 1182(a)(9). The court below correctly explained that petitioner's reliance on *Costello* v. *INS,* 376 U.S. 120 (1964), and *United States ex rel. Brancato* v. *Lehmann,* 239 F.2d 663 (6th Cir. 1956), was misplaced (Pet. App. 16):

> Notwithstanding this general reluctance to attach retrospective effect to the deportation laws, we believe that neither *Brancato* nor *Costello* are dispositive of the case at bar. Each of these cases interprets statutes which are not directly at issue here. More importantly, both decisions are premised on the utter lack of any authority in the texts or legislative histories regarding retroactivity. Here, however, by referring to "the law existing at the time of * * * entry," Congress expressly designed Section 1251(a)(1) to reflect changes in the laws of excludability. Although for reasons outline[d]

above, it did not do the same for changes in criminal statutes used to analogize to foreign convictions, such an interpretation is completely in keeping with the language and the purpose of the deportation statute. Unlike the courts in *Brancato* and *Costello*, therefore, we have explicit, albeit indirect, authority for using the relation-back concept in construing the statute before us. Accordingly, we believe these cases to be distinguishable.

No alien can claim a right to enter the United States. Congress has sovereign and plenary power to determine which aliens shall enter. *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977). Even after an alien is permitted to enter, he acquires no vested right to remain in this country and is subject to expulsion on grounds fixed by Congress. See *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 711 (1893); *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659 (1892). Because petitioner had no vested right to enter or remain in the United States, and because the court of appeals reasonably construed the Immigration Act in applying the standards reflected in D.C. Code Ann. § 22-1410 (1973) as of the time of petitioner's entry, petitioner's challenge to the decision below is without merit.

It is entirely appropriate to evaluate the seriousness of a particular offense for immigration purposes by the standards prevailing at the time of an alien's entry into the United States. No alien has a "right" to have his foreign conviction assessed by the standards existing in the United States on the date the foreign judgment of conviction was entered; there is no nexus between the alien and this country at that time. It makes far more sense to test the conviction for excludability purposes at the moment the alien enters the United States. Moreover, as the court below noted (Pet. App. 18 n.16), a "time of entry" rule is no more likely to

produce harsh or fortuitous results than the "time of conviction" rule urged by petitioner. Accordingly, the challenged order of deportation was properly affirmed.

3. In any event, petitioner has not demonstrated that the issues he presents are likely to arise with any frequency. First, the court of appeals decided that the lesser included domestic offense was more closely analogous to petitioner's foreign offense based on the "rather peculiar facts" of this case (Pet. App. 10). There is no reason to suppose that a substantial number of aliens convicted of crimes involving moral turpitude will be regarded as having been convicted of a misdemeanor under the analysis adopted by the court below. Moreover, petitioner's claims arise from the highly unusual fact that the allegedly equivalent United States offense was classified as a misdemeanor at the time of petitioner's foreign conviction but as a felony at the time of his entry into this country. We doubt that a significant number of aliens are, or are likely to be, in a position similar to that of petitioner.

Furthermore, unlike in *INS* v. *Wang*, 450 U.S. 139 (1981), on which petitioner relies (Pet. 6-7), the court of appeals in this case did not overrule the BIA's interpretation of the immigration laws. In fact, the court affirmed the BIA's finding that petitioner was deportable under 8 U.S.C. 1251(a)(1) and 1182(a)(9). It is true that the court decided a question of statutory intrepretation that had not been addressed by the BIA, but it did so only in response to petitioner's argument that the BIA had erred in not using D.C. Code Ann. § 22-1410 (1973) as the appropriate analog to petitioner's Canadian offense. The fact that the BIA had never before addressed the question whether the analogous offense must be viewed as of the time of conviction rather than as of the time of entry suggests that the issue is not a recurring one. And if the issue ever does arise, it is quite

conceivable that the BIA will agree with the interpretation of the court of appeals. If the BIA adopts a contrary interpretation, there will be time enough to resolve the question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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